CHAN SEOW LOK & ANOR A

v.

MUSTAPHA MOHAMED & ORS

HIGH COURT MALAYA, IPOH B
LEE SWEE SENG JC
[SUIT NO: 22-176-2010]
17 JULY 2013

COMPANY LAW: *Receivership - Misfeasance and breach of trust - Allegation of - Whether receivers committed misfeasance or breach of trust or duty in disposing of assets of company - Companies Act 1965, s. 192(2) - Whether receivers acted above board and bona fide - Whether validity of appointment of receivers continued despite vesting of corporation that appointed receivers with another entity - Banking and Financial Institutions Act 1989, s. 50 - Effect of* C D

The plaintiffs were contributories of the third defendant company ('D3') which was under liquidation. Prior to the winding-up, the first and second defendants ('the receivers') were appointed by debenture-holder, CIMB Bank, as receivers and managers of D3 and later as receivers of the company. Thereafter, by a vesting order under s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'), all assets, rights and interests of CIMB Bank with respect to certain loans became vested with Southeast Asia Special Asset Management Berhad ('SEASAM'). In the instant action, the plaintiffs applied under s. 192(2) of the Companies Act 1965 for the court to examine the conduct of the receivers to see if they had committed misfeasance or breach of trust or duty in disposing of the assets of D3 to the fourth defendant ('D4') which, in turn, sold the assets to the fifth defendant ('D5'), and that in the event the receivers were liable, they be ordered to pay such compensation to the company as was ordered by the court. The plaintiffs contended, *inter alia* (i) that although the receivers had only tendered for the sale of the company's moveable assets, the company's building (minus the land) was also demolished and given away as scrap; (ii) that the receivers had dissipated the assets of the company; and (iii) that because of the vesting order, CIMB Bank's appointment of the receivers ceased to have effect and they had to be re-appointed by SEASAM before they could have the power to sell the assets of D3. E F G H

Held (dismissing application with costs):

(1) The evidence did not show any malice on the part of the receivers in the discharge of their duties nor did it show they had acted in total disregard of the interests of D3 or its contributories. The I

receivers were not shown to have misapplied or wrongly retained any amounts realised by them nor was there evidence of any collusion or conspiracy between them and D4 or D5 to defraud or disregard the interests of D3. The receivers were not liable under s. 192(2) of the Companies Act and the plaintiffs had failed to discharge their burden of proving that the receivers had committed misfeasance, breach of trust or breach of duty. (paras 31, 49 & 50)

(2) The receivers had a broad discretion in disposing of D3's building as scrap as it was in a dilapidated condition and needed to be maintained and security to be hired. At the material time, the receivers could not sell the land as they did not have possession of the original title to the land. To dismantle the building and clear the whole place of debris and wastage costs RM50,000. Thus, the receivers made an offer to D4, to demolish the building and remove all scrap and debris from the site. There was nothing wrong in what the receivers did. They had acted in the best interests of D3 to secure the best price at the lowest costs and managed to realise the best value of the assets to pay the monies owing to the debenture-holder. (paras 27, 40 & 41)

(3) If the plaintiffs had buyers for a better price they should have put in their bids or the plaintiffs themselves should have introduced buyers who were interested in the machinery. In the absence of such evidence, the receivers had acted above board and *bona fide* in all the circumstances of the case. There was no good reason to doubt their integrity in the auction process or in their motive in disposing of the assets of D3. There was no duty on them to have done an expert valuation on the machinery and moveable assets before holding the auction. In Malaysia, there was no specialist publication for D3's line of equipment. Considering the type of moveable assets that were put up for sale, it was sufficient for the receivers to have advertised the sale to get the highest bidder for the items. The plaintiffs themselves did not call any expert to challenge the sale prices. (paras 28, 32 & 44)

(4) Pursuant to s. 50 of the BAFIA and the relevant clauses in the vesting order, the appointment of the receivers by CIMB Bank continued as if SEASAM had appointed them. SEASAM did not have to appoint them afresh. The appointment of the receivers continued after even after the vesting order and they had the right and power to sell the assets of D3 pursuant to the terms in the debenture. (para 19)

Case(s) referred to:

American Express International Banking Corp v. Hurley [1985] 3 All ER 564 ***(refd)***
China & South Sea Bank Ltd v. Tan Soon Gin, George [1990] 1 CLJ 665; [1990] 3 CLJ (Rep) 398 CA ***(refd)***
Chong Chee Chung v. Standard Chartered Bank Malaysia Bhd & Anor [2012] 5 CLJ 161 CA ***(refd)***
Dato' Fathi Hj Ahmad v. Standard Chartered Bank Malaysia Bhd [2006] 1 CLJ 273 CA ***(refd)***
Latchford v. Beirne [1981] 3 All ER 705 ***(refd)***
Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***
Mangifera Park Development Sdn Bhd & Ors v. Ali Tan Sri Abdul Kadir & Ors and Third Party [1996] 1 LNS 247 HC ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***
PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd [2001] 4 CLJ 788 HC ***(refd)***
Tse Kwong Lam v. Wong Chit Sen and Others [1983] 3 All ER 54 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 50(1), (3)
Companies Act 1965, s. 192(2)
National Land Code, s. 420

Other source(s) referred to:

Palmer's Company Law, 22nd edn, 1970, vol 1, p 443

For the 1st plaintiff - Shivdev Singh; M/s LH Singh & Co
For the 2nd plaintiff - In person
For the 1st & 2nd defendants - N Sivagurunathan; M/s Shamsiah KE Ng & Siva
For the 3rd defendant - Intan Zainoriah; FC
For the 4th defendant - Not represented
For the 5th defendant - Not represented

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiffs (P1 and P2) are contributories of the third defendant (D3) (in liquidation). They were unhappy with the conduct of the receivers in the first and second defendant (D1 and D2) in disposing of the assets of the company D3. The assets consisted of the moveable assets and the building (not the land) of D3. They complained of the auction process and the gross under-value at which the assets of the company were sold.

A **Parties And Personalities**

[2] The first plaintiff is Chan Seow Lok. He does not have much knowledge on the running of the company D3. The main witness for the plaintiffs is the second plaintiff. He is John William Concisom a/l Willie Brod as administrator of the estate of Sara Theresa d/o VA Fernandez. As he had already been made a bankrupt, he had to obtain the sanction of the official assignee to proceed with this suit which sanction he managed to obtain just before the commencement of this trial.

[3] D1 is Mustapha bin Mohamed and D2 is Dato' Jeyaraj a/l V Ratnaswamy. Together they were appointed by CIMB Bank as receivers and managers ('R&M') on 2 June 2009 and later as receivers of the company D3. There was later a vesting order dated 15 January 2010 obtained by CIMB Bank in favour of Southeast Asia Special Asset Management Berhad ('SEASAM') of all its assets, rights and interest with respect to certain loans.

[4] D3 is the company called Ngai Seng Rubber Industries Sdn Bhd, initially in receivership and later went into liquidation on 11 December 2009. D4 is Sunda Metals Sdn Bhd, the successful bidder of the assets of the company and D4 subsequently sold it to D5, Kwang Te Machineries Sdn Bhd. Both their solicitors have discharged themselves by the time of trial and so they were both not represented. D6 is the Director General of Insolvency, the provisional liquidator appointed upon the winding-up of the company D3.

Prayer

[5] The plaintiffs as contributories of D3 (in liquidation) have applied under s. 192(2) of the Companies Act 1965 for the conduct of the receivers to be examined by the court to see if they have been guilty of misfeasance, or breach of trust or duty in disposing of the assets of the company D3. Should the receivers be found liable then they are to pay such compensation to the company as may be ascertained by the court.

[6] Plaintiffs agreed that if D1 and D2 are not liable then D4 and D5 would not be liable.

[7] The court's duty is to examine if the conduct of R&M was below that of what is expected of them.

Principle

[8] The plaintiffs as contributories of the company D3 have brought this suit under s. 192(2) of the Companies Act 1965. The section reads:

> **Section 192. Enforcement of duty of receiver, etc., to make returns**
>
> (2) If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or **being guilty of any misfeasance or breach of trust or duty in relation to the company**, the Court may, on the application of any creditor or contributory or of the liquidator, examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just. (emphasis added)

[9] Based on the evidence adduced, the only relevant limbs are that of misfeasance or breach of trust or breach of duty on the part of the R&M in selling some of the assets of the company. Misfeasance involves the element of malice or *mala fide* and a knowledge of perpetrating an unlawful act which will injure the innocent party.

Whether The R&M Have The Right To Dispose Of The Assets Of The Company After The Vesting Order

[10] The argument of the plaintiffs goes like this: the R&M were appointed by CIMB and so when all of CIMB's rights and interests under the security documents with respect to the company have become vested in SEASAM through a vesting order obtained by CIMB, the appointment ceases to have effect and SEASAM then would have to reappoint the R&M before the R&M could proceed to sell the assets of the company.

[11] The vesting order is one made under s. 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'). It has the effect of transferring the property or business with respect to the loan facilities in question from the transferor to the transferee; in this case from CIMB to SEASAM irrespective of whether the company is aware of it or have notice of it. The section or rather so much of it as may be relevant here reads:

> Section 50. Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to

A (1) Where the Minister has granted his approval under subsection 49(7) to an application in respect of an agreement or arrangement under paragraph 49(1)(b) or (c), **the licensed institution whose business is to be transferred** (hereinafter referred to as **"the transferor")** and **the licensed institution or other person to whom the transfer is to be made** B (hereinafter referred to as **"the transferee"**) may make a joint application to the High Court by way of an *ex parte* originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders: ....

C (c) **for any existing instrument**, whether in the form of a deed, will or otherwise, *or order of any court, under or by virtue of which any property became vested in the transferor, to be construed and to have effect as if for any reference therein to the transferor there were substituted a reference to the transferee*;

D (3) **Where the order of the High Court** under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, *by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee* E either alone or, as the case may be, jointly with such other person, and **the order shall have effect** according to its terms *notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section* or any other related proceedings, or **had no notice of the proceedings** F under this section or of other related proceedings. (emphasis added)

[12] The effect of a vesting order made under BAFIA has been clearly explained in the case of *Leong Moh Sawmill Co Sdn Bhd v. Standard* G *Chartered Bank & Ors* [1997] 2 CLJ 131 at pp. 144-145; [1996] 2 MLJ 614 at pp. 623-624 and put beyond a pale of doubt and peradventure:

> The vesting order of 28 April 1994 was such that there is no requirement in law to effect a substitution of the plaintiff. Paragraph 2(d) of the order states that *any reference to the predecessor bank in any* H *existing instrument of any nature vesting any title, assets or liability on the predecessor bank shall, without any further act by the predecessor bank, be construed as if the reference has been substituted with a reference to the successor bank* with effect from 1 July 1994. Paragraph 2(k) of the vesting order also states that where any right or liability of the predecessor bank is to be transferred to the successor bank, then the I latter shall, without any further act of the former, have the same rights, powers and remedies like commencing or defending any legal

proceedings including rights and liabilities in respect of any legal proceedings pending before 1 July 1994 by or against the predecessor bank.

Likewise, para 2(l) of the vesting order which states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall – with effect from 1 July 1994, and without any further act of the predecessor bank – be enforceable by or against the successor bank as if the latter had become a party to the judgment or award. *We consider that the effect of this particular order is that the successor bank is deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank, and for practical purposes, this means that the successor bank is very much a party to the order of sale obtained on 4 October 1985.*

It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus, the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank. (emphasis added)

[13] In that case by a vesting order made under s. 50(1) of BAFIA, the predecessor bank transferred and vested all its banking business in a successor bank. Pursuant to an order for sale, an auction was carried out in the name of the predecessor bank. The issue before the court was whether the predecessor bank could continue to pursue matters relating to foreclosure proceedings in its name after it had already sold all its banking business in Malaysia to the successor bank pursuant to the vesting order. In delivering the judgment of the court Siti Norma Yaakob JCA (as she then was) held *inter alia* that based on the provisions of s. 50(3) of BAFIA, the successor bank was deemed to be a party in all proceedings initiated by or commenced against the predecessor bank.

[14] While the context was that of substitution of parties in a court proceeding with respect to a subsequent application for directions in an auction matter after an order for sale, the same applies with equal force to all documents and in the present case the debenture documents and the appointment of the R&M by CIMB which is now read as the appointment by SEASAM of the R&M. Whether it be the analogy of the predecessor bank leaving its shell and the successor bank filling in the space or that of the predecessor bank leaving its shoes and the successor special purpose vehicle stepping into the shoes, the end result is the same. It is an immediate substitution, valid and legal for all intents and purposes.

[15] *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors (supra)* was relied on in the case of *PhileoAllied Bank (Malaysia) Bhd v. Koshish Credit & Leasing Sdn Bhd* [2001] 4 CLJ 788 where the plaintiffs' business and assets had been vested in Malayan Banking Bhd ("Maybank") pursuant to a vesting order. At the hearing of foreclosure proceedings a preliminary objection was raised by counsel for the defendants that the plaintiff could not proceed with the originating summons unless and until the registered charge had been registered in the name of Maybank by way of filing the vesting order in the appropriate land registry. The view advanced for the defendant was that under s. 50(3) vesting could only take effect after it had been registered with the relevant authority. For the plaintiff it was submitted that under s. 50(3), the vesting order superseded all written laws, even the National Land Code, and that the terms of the said vesting order allowed the plaintiffs originating summons to be continued without the necessity of substituting Maybank as the plaintiff or transferring and registering the registered charge in the name of Maybank at the appropriate land registry. In his judgment Low Hop Bing J (as His Lordship then was) states that the words of s. 50 of BAFIA which expressly provides that the vesting order "shall have effect according to its terms notwithstanding anything in any law or in any rule of law" prevails over or supersedes the provisions of both the Rules of the High Court 1980 and the National Land Code and where there is inconsistency between the provisions of two Acts of Parliament, as in s. 420 of the National Land Code and s. 50(1) and (3) of BAFIA, the latter which was enacted some 24 years later must prevail. Hence His Lordship held at pp. 793-794 as follows:

> However, in the instant case, the vesting order is all encompassing and s. 50(3) BAFIA allows the proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff, or transferring and registering the registered charge in the name of Malayan Banking Bhd.
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> This is because s. 50(3) BAFIA provides that the terms of the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, thereby prevailing over or superseding the provisions of both the Rules of the High Court 1980 and the NLC.

[16] The above two cases cited were followed in the Court of Appeal case of *Chong Chee Chung v. Standard Chartered Bank Malaysia Bhd & Anor* [2012] 5 CLJ 161; [2012] MLJU 107.

[17] Likewise in another subsequent Court of Appeal case of *Dato' Fathi Hj Ahmad v. Standard Chartered Bank Malaysia Bhd* [2006] 1 CLJ 273; [2006] 2 MLJ 454, it was summarised as follows in the headnotes at p. 455 (MLJ):

> (1) The vesting order permitted the SCB to continue with the proceedings under its name or alternatively to formalize the proceedings by amending the name of SCB to SCBMB. There was nothing in the vesting order to stop them from doing so because the creditor's petition was a continuation of proceedings from the judgment obtained or at the very least a continuation of the bankruptcy notice (see para 8).
>
> (2) Section 50(1)(j) and (k) and paragraphs 2(k) and (l) of the vesting order made provisions for pending legal proceedings. The provisions made clear that SCBMB could step into the shoes of SCB without any legal obstacles. In the instant case, the bankruptcy notice was issued in the name of SCB because it was done before the vesting order was made. It was only proper therefore for SCB to be the petitioner in the petition. To formalize proceedings SCB applied to amend the creditors petition to substitute SCBMB's name for SCB (see para 11).

[18] The position of the law as propounded in the above cases is crystal clear. In the light of a vesting order under s. 50 of BAFIA, whenever the name of the previous predecessor entity appears, it is now being substituted by the name of the successor entity and it is deemed to have been so substituted whether or not an application to that effect is done in court or by confirming in writing. The intention of Parliament in enacting s. 50 of BAFIA is to cut right through all the time-consuming matters of giving notice to the many who otherwise would be entitled to receiving notice of such a vesting and substitution and to obviate the necessity of making numerous applications to courts for the successor entity to be so reflected in all pending actions.

[19] Thus I would agree with learned counsel for the R&M that pursuant to s. 50 of BAFIA and the relevant clauses in the vesting order, all actions taken by CIMB Bank, including the appointment of the R&M continue as if SEASAM has made the appointment. The Form 59 under the Companies Act 1965 lodged by CIMB with the Companies Commission of Malaysia (CCM) is deemed lodged by the new entity in SEASAM. Even if there is a requirement for a fresh filing of the said Form 59, that has been overridden by s. 50(3) BAFIA. I would say without fear of contradiction that the appointment of the receivers continued after the vesting order. There was no termination of the appointment by SEASAM. There was no need of a fresh appointment by SEASAM. If there is anyone who has a right to object

to the receivers continuing to act, it is SEASAM themselves but here there is no evidence of that. I would thus conclude that the appointment of the receivers continued even after the vesting order and the receivers had the power and right to sell the assets of the company pursuant to the terms in the debenture.

Whether There Was Misfeasance Or Misapplication Of The Company's Assets Or Breach Of Trust Or Duty On The Part Of The Receivers

[20] The plaintiffs have taken umbrage with the receivers with respect to the sale of the companies' assets to Sunda Metals Sdn Bhd (D4) and have alleged misfeasance and fraud on the part of the receivers for the following reasons:

(a) Acceptance of the offer was after the closing of the tender;

(b) The letter of offer to purchase the assets by D4 was for the items contained in the information memorandum (IM) but the sale of the building (which was not in the IM) was included without any consideration; and

(c) Finally, in the course of selling the assets of the company, the receivers had dissipated assets of a third party.

[21] Learned counsel for the receivers pointed out that the plaintiffs had not pleaded that the receivers had not obtained a true market value on the assets or that the assets were sold at an undervalue.

[22] So long as the receivers have sought to obtain the best price possible for the company within the time given to them to realise the assets of the company to pay the debenture holder, that would suffice. Clause 13(c) empowers to receivers to sell the assets of the company by public auction or private contract. Clause 13(c) and (d) are reproduced below:

> Clause 13(c) - the Receivers are vested with the power to sell the assets of the Company by public auction or private contract or otherwise dispose off or deal with all or any of the property and assets charged under the Debenture at such time and in such manner and at such price as they may in their absolute discretion deem fit in exercising such discretion he or they may have regard to the views and desires of the Bank …; and
>
> Clause 13(d) - to make any arrangement or compromise which he or they shall think expedient" (page 14 of Part A Bundle B)

[23] The R&M advertised the intended sale of the assets of the company in The Star newspaper on 7 May 2010 (p. 64 Part A of bundle A). It was captioned "offer for sale by receivers and managers". It states *inter alia* as follows:

> Offers are invited for the purchase on an "as it where is basis" of assets of a Company principally involved in manufacturing rubber tubes for passengers and commercial vehicles.

[24] All interested are to submit their offers together with 10% of the offer price by way of a cashier's cheque as earnest deposit and to be delivered to the address stated of the R&M no later than 5pm on 27 May 2010.

[25] The details are to what was available for sale are contained in the IM that could be purchased from the R&M for RM100 from 9am to 5pm from 7 May 2010. The IM appears at pp. 22-72 of Part B of bundle B. The following disclaimer provisions in cl. 5.6 of the IM would be relevant:

> Clause 5.6.1
>
> The Receivers reserve the right to modify, add and/or revise any of the Offer procedures and terms and conditions of sale at any time as they deem fit. The Receivers also reserve the right to waive any of the terms as contained herein as deemed fit. However, such waiver shall be without prejudice to the Receivers' right to demand subsequent compliance with them;
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> Clause 5.6.2
>
> The Receivers are not bound to accept the highest or any offer;
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> Clause 5.6.3
>
> The Receivers are under no obligation to disclose to any Offerors the Offers received or the particulars thereof;
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> Clause 5.6.4
>
> In the event that any of the Offers submitted are substantially on the same terms and/or amounts, the Receivers may at their sole discretion call upon those Offerors to submit further revised Offers;
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> Clause 5.6.5
>
> The process and time, frame for request of revised Offers to be submitted shall be determined at the sole discretion of the Receivers;

[26] DW1 Dato' Jeyaraj a/l V Ratnaswamy who gave evidence as D2 and also on behalf of D1 agreed that the offer by Sunda Metals Sdn Bhd was accepted after the closing of the offer for sale and that the

A sale included the building without additional consideration. I can accept the reasonable explanation of DW1 in doing that. The explanation as summarised by Mr Sivagurunathan for the receivers is as follows:

(a) At the closing date, the receivers had only received two offers with deposit of 10%. As there were inquires before and after the closing date, he had extended that closing date and during which time received a further two other offers.

(b) One from Nelchand Steel Recycle Industry Sdn Bhd for a sum of RM650,000 for the items in the information memorandum, RM10,000 for a lorry and RM40,000 for the scrap of the building, and the other from Sunda Metals Sdn Bhd, for RM720,000 for the items in the information memorandum.

(c) After receiving an offer for RM40,000 for the scrap metal from building from Nelchand Steel Industries Sdn Bhd, it prompted the receivers that it would be best to bring down the building and sell its scrap. They thus negotiated with Sunda Metal who had made the highest offer for the items in the information memorandum to bring down the building and clear the grounds.

[27] I agree that the receivers have a broad discretion to decide to dispose of the building as scrap. The decision was constrained by the following as submitted by learned counsel for the receivers:

(a) the building was made mainly of bricks/metal cladding and was in a dilapidated condition which needed to be maintained and security need to be hired. As at the material time, as the receivers did not have possession of the original documents of title of the land which were then held by the directors of the company, they were unable to sell the land. Thus to avoid the costs of maintaining the building and providing security for it, it would be prudent to bring down the building and to hold only an empty land.

(b) PW2 in cross-examination admitted that the title to the land were held by him and was only given to the receivers after a court order compelling him to do so on pain of contempt and that without the said title, the land could not be sold by the receivers.

(c) Having made enquiries in respect of the costs of dismantling and clearance of wastage and debris and cleaning up the whole place thereafter which was about RM50,000, an offer was made to Sunda Metals Sdn Bhd to remove the metal scrap of the building provided they also demolish the whole building structure and remove all debris and give vacant land to the receivers in a clean condition.

(d) Further in evidence, DW1 said that, in exercising the power of sale conferred by the debenture and the IM, they were allowed to exercise such discretion which they deemed fit in the circumstances. They had acted in the best interest to secure the best price at the lowest costs and managed to realise the best value of the assets towards the payment of monies due to the debenture holder.

[28] I cannot fault the receivers for the above course of action constrained by the circumstances of the case. If indeed there are buyers for a better price the plaintiffs could always ask them to put in their bid or offer or call them as their witnesses with evidence that they had offered to purchase at a higher price and depositing their 10% deposit. The plaintiffs could have called these bidders if indeed they were willing to purchase the building for RM1 million and RM9,955,441 for the other assets. In the absence of such evidence the receivers have acted above board and *bona fide* in all the circumstances of the case. I see no good reason to doubt the integrity of the auction process or the motive of the receivers in disposing of the building and the moveable assets of the company.

[29] In *Mangifera Park Development Sdn Bhd & Ors v. Ali Tan Sri Abdul Kadir & Ors and Third Party* [1996] 1 LNS 247; [1996] MLJU 455, an application was made by the plaintiffs for an order that the court examines the conduct of the four defendants as receivers and managers of the company called Growth Corporation Sdn Bhd (In Liquidation) pursuant to s. 192(2) of the Companies Act 1965 and for an order, upon such examination, to compel the defendants to repay or restore any monies or properties if the court is of the opinion that the defendants are guilty of any misfeasance or breach of trust or duty in relation to the said company in liquidation. As one of the grounds for the application was that the receivers had sold the companies' assets below market value, the observation of His Lordship KC Vohrah J (as he then was) is especially relevant and is reproduced below:

> It is the complaint of the plaintiffs that the Receivers and Managers did not sell the land at the true market value at the time of sale as they were under a duty so to do relying on *Re Sama Corporation Sdn Bhd; CI Holdings Bhd v. Jabatan Pemegang Hasil* [1992] 2 MLJ 251, *American Express International Banking Corp v. Hurley* [1985] 3 All ER 564 and *Tse Kwong Lan v. Wong Chit Sen* [1987] 1 WLR 1349.
>
> While the plaintiffs have made the allegation that the defendants failed to obtain true market value on the properties there is no evidence to support the allegation and the burden is on the plaintiffs who have made the allegation. Low Chee Been in his affidavit for the plaintiffs (see Encl 2) stated in paragraph 38(2) that on 7.7.1986 the Growth's valuers valued the said 68 units of properties at RM19,100,000.00,

A but the clear evidence of the defendants in para 76 of the affidavit in reply (Encl 9) of the 1st defendant shows 60 units of properties were sold at RM19,545,460.38.

It was also the complaint of the plaintiffs that there was delay in selling and it was not the best time to sell the properties, but the evidence as
B stated above shows a sale price of RM19,545,460.38 for 60 units over what the plaintiffs' valuers had valued 68 units of the properties (RM19,100,000.00) at an earlier date.

In any event in *China & South Sea Bank Ltd v. Tan Soon Gin (alias George Tan)* [1990] 2 WLR 56 the Privy Council held that a creditor
C owes no duty to the surety to exercise its power of sale over mortgaged securities and could decide in its own interest whether to sell and when to do so and that where a creditor has not done any act injurious to the surety or inconsistent with his rights, or failed to perform any act which it was under a duty to do, equity will not intervene to protect the surety. So far as the plaintiffs are concerned they have not shown
D grounds for which equity should intervene.

[30] In *China & South Sea Bank Ltd v. Tan Soon Gin, George* [1990] 1 CLJ 665; [1990] 3 CLJ (Rep) 398 at pp. 398 and 399, a Privy Council's decision from Hong Kong, it was held as summarised in the
E headnotes as follows:

[2] Equity intervenes to protect a surety and if through any neglect on the part of the creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged. In the present case, the security was neither
F surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor.

[3] The surety contracts to pay if the debtors do not pay and the surety is bound by his contract.

[4] In the present case, the creditor did not act injurious to the
G surety, did not act inconsistent with the rights of the surety and the creditors, did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all.

H (Advise to Her Majesty: Appeal allowed, order of Court of Appeal set aside, order made by Rhind J to be restored. Respondent to pay appellant's costs in the Court of Appeal and Privy Council.)

[31] The burden of proof that the receivers are liable for misfeasance,
I breach of trust or breach of duty is on the plaintiffs here as contributories under s. 192(2) of the Companies Act 1965 is on the plaintiffs. The plaintiffs have not discharged this burden. To quote a

passage from the Federal Court's decision in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; [1970] 1 MLJ 145 at p. 148:

> In my judgment even so the basis stated the appellant cannot succeed. So far as it is a party seeking relief the onus is clearly on them to satisfy the court that it is entitled to relief. Section 102 of the Evidence Ordinance provides that in a suit or proceeding the proof lies on the person who would fail if no evidence was given on either side. Here the appellant's affidavit merely contained allegations that the respondent has no right to enter the caveat. The respondent has countered by saying that he has a right. In the event it was clearly for the appellant to prove the allegation, negative though it may be ...

[32] It was argued by Mr Concisom that the price must first be had by way of a specialist valuation report. I can accept the evidence of the receivers that in Malaysia there is no specialist publication for this line of equipment for making rubber tubes for tyres of vehicles. I find that in the circumstance of the case involving a sale of the moveable assets in the nature of machinery, forklifts, raw materials, loose tools, furniture and fittings and scraps of the company, it was sufficient for the R&M to have advertised the sale so as to get the highest bidder from those interested.

[33] The case of *American Express International Banking Corp v. Hurley* [1985] 3 All ER 564 cited by the plaintiffs through their learned counsel Mr Shivdev Singh, can be distinguished as in that case the guarantor had specifically communicated the price for the musical instruments which price a third party was prepared to purchase and if that should fall through, the guarantor was also prepared to buy at a much higher price than the price at which the receiver finally sold the assets. The claim there was for negligence and not the equivalent of our s. 192(2) which is more in the nature of misfeasance, misapplication, wrongful retention and breach of trust.

[34] There the defendant counterclaimed against the bank and the receiver, contending that the receiver had been negligent in selling the equipment for the price he did because he had failed to take specialist advice or to advertise in specialist publications, and that the bank was liable both originally and as a principal for the receiver's negligence. The bank claimed that, in the event of it being liable to the defendant, it was entitled to be indemnified by the receiver.

[35] As was summarised in the headnotes at p. 564:

> (2) A mortgagee, or a receiver, was under a duty to a guarantor of the mortgagor's debt to take reasonable care to obtain the true market value of the mortgaged property when either of them

A realised the property in the exercise of a power of sale. In the circumstances the receiver had not taken reasonable care to obtain the true market value of the equipment, because although he knew that the equipment was of a specialist nature and that it had been valued at £193,323, he had failed to take specialist advice from anyone in the popular music business and he had
B failed to advertise in publications specialising in the popular music industry. Accordingly, the receiver had been negligent and the bank was liable to the guarantor. It followed that, although the bank had a claim against the defendant under the guarantee according to its terms, it was under a liability, as principal, to the defendant for the negligent acts of the receiver. Furthermore,
C the receiver was liable under an implied term of the contract of agency between the bank and the receiver to indemnify the bank against any loss caused by his negligence.

[36] As was observed by Mann J at p. 572:

D Mr Jordan knew that the guarantor, Mr Hurley, was anxious to have an opportunity to bid for the equipment and thought that he would raise the money to do so either from the bank or elsewhere. In fact proposals were made to the bank. On 18 March 1982 Mr Hurley told Mr Jordan that he was in negotiation with Marquee-Entec Ltd for the purchase of the equipment for £90,000 and that if that negotiation
E came to nought he would bid for the equipment himself as he had four parties interested in some of the items in the sum of £84,000.

[37] Mr Shivdev also cited *Latchford v. Beirne* [1981] 3 All ER 705 where it was held at p. 708:

F It is now well settled that a mortgagee exercising his power of sale, in the absence of contractual provision to the contrary, owes a duty to the mortgagor to take reasonable care to get the true market value of the security at the moment when he (the mortgagee) chooses to sell.

G **[38]** Further at p. 709 Milmor J quoted a passage from *Palmer's Company Law* (22nd edn., 1970, vol 1; p. 443):

The Receiver is entitled to exercise the power to sell in the best interests of the debenture holder. It does not matter that the moment of sale may be unpropitious and that he might obtain a higher price by postponing the sale. But it is thought that the Receiver is liable to
H the company if, when carrying out the sale, he acts in bad faith or omits to take reasonable care, e.g. if he negligently fails to make public important particulars of the property to be sold and consequently the price obtained for it is lower than it otherwise would have been.

I **[39]** See also the case of *Tse Kwong Lam v. Wong Chit Sen and Others* [1983] 3 All ER 54 expounding the same proposition.

[40] No one should have a quarrel with the established propositions of law laid down on the duty expected of a receiver. In any event the R&M did advertise and two bids were received. There was nothing wrong in them exercising their discretion to extend the bid period and also in negotiating with the highest bidder to remove the building by demolishing it for a consideration that the bidder was entitled to take the metal scraps and whatever they may need from the demolished building. The end result was that the bidder must also give a level and cleared premises and land to the R&M. I accept the reason given by the R&M for this move as the building was old and the land could not be sold as the title was being retained by P2 who was also the solicitor for the company at that time.

[41] Having the building on the land would require maintenance and guard services as well. In the circumstance I see nothing wrong in the sale to include removing the building as well. The price at which it was agreed with D4 was also much higher then that offered by the second highest bidder, Nelchand Steel Recycle Industry Sdn Bhd.

[42] The *American Express* case *(supra)* can also be distinguished as there the loan was secured against the only asset of the company in the musical instruments and there was a valuation done on the instruments before the loan was taken.

[43] There is no evidence of any conspiracy or collusion with D4 or D5 on the sale. Indeed in the standard-form prescribed letter that all bidders must deliver to the receivers, there is a clause on "Non-collusion agreement" as follows:

> We agree not to act in collusion or agreement with any other Offeror in connection with the offer submission or the determining of the offers that are to be submitted to the Receivers. (page 70 of Part B of Bundle B)

[44] Anyone interested in the purchase could have come and bid or could have submitted the bid documents and the plaintiffs themselves could also introduce purchasers in this business who are interested in the machinery. I hold that there is no duty to have an expert valuation done on the machinery and assets (not being landed assets) of the company before an auction by way of tender is held. The plaintiffs have also not called any expert at their end to say that the price would be materially different.

[45] The R&M do not have to wait for more bids to come in before deciding to offer it to the highest bidder. There is no evidence that by doing so they have acted recklessly or in total disregard to the interest of the borrower or its contributories.

[46] There was also the complaint that the R&M had disposed of the assets (finished products) belonging to one Awtoline Turrmensitan ("Awtoline"). The documentary evidence produced is a letter by the solicitors Messrs LH Singh & Co dated 3 June 2010 to the R&M (p. 5 of Part B of bundle B). The said letter made reference to supporting documents but those documents were not produced in court. PW1 who is P1 being the managing director of the company admitted under cross-examination that the statement of affairs of the company D3 was never filed after the liquidation of the company which if filed, would have stated the status of the claims of a third party.

[47] It is pertinent to note that DW1 as D2 has not received any demand from the said Awtoline or any other party claiming that their goods were in the custody of the company. In fact PW2 who is P2 admitted that the matter is a third party claim against the receiver if the third party in Awtoline is minded to do so.

[48] PW2 could have asked Awtoline to write directly to the receivers and the receivers, if they are satisfied with the evidence, may release those goods claimed. However to this date, no demand has been made by the said Awtoline. There is thus no merits in this complaint which should be taken up by the party that has *locus* for it, which is Awtoline.

Pronouncement

[49] I find that based on the evidence adduced there has not been shown any malice on the part of the R&M in the discharge of their duties or that they have acted in total disregard of the interest of the company or its contributories or that the R&M have misapplied or wrongly retained any amounts realised by them.

[50] Even assuming for a moment that D4 had sold the self-same assets to D5 at a higher price (which this court finds the plaintiffs have not so proved) that by itself does not make the R&M liable under s. 192(2) of the Companies Act 1965. There is no evidence of any collusion or conspiracy between the R&M and D4 or D5 to defraud or disregard the interest of the company.

[51] In the circumstances I was constrained to dismiss the plaintiffs' claims with costs.

[52] After hearing arguments, I ordered costs of RM30,000 be paid by the plaintiffs to the R&M in D1 and D2.

[53] As for the other defendants, the claims are also dismissed with no order as to costs as they have participated much in the proceedings.